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JAMES R. BROWNING, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 173

BARNEY FRIEDMAN and SARAH FRIEDMAN, husband and wife, d/b/a City Metal Salvage Company,
Petitioners,

VERSUS

LEROY HILL,
Respondent.

PETITION FOR REHEARING

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
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CITIZEN-BACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

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Come now the petitioners, Barney F. Friedman and Sarah Friedman, husband and wife, and show to this Court that this Court has heretofore declined to take jurisdiction in this cause, that these petitioners respectfully show to the Court that this Court should consider said matter and take jurisdiction of this cause, for the reason they have been denied due process of law and the State Court refused to consider their appeal upon its merits and in violation of their duty to determine the jurisdictional question therein involved.

These petitioners show to this Court that they owed absolutely nothing to the respondent, Leroy Hill, that at the time they tried their case in the State District Court they did not know the said Leroy Hill was a convict; that he had

been convicted more than twelve (12) times; that he was then an inmate of the State Insane Asylum and that they discovered all said matters after said trial, and that they further discovered that the said Leroy Hill was employed working in a cafe at the same time and at the very time for which he sought judgment and received judgment in this cause; that the attached affidavit to our Motion for a New Trial was overruled and the Supreme Court of Oklahoma refused to consider the evidence, although it was necessary to consider the evidence to determine the jurisdictional question, and that, therefore, they were denied due process of law in this cause.

These petitioners believe that they have been denied their rights by virtue of and on account of the fact that they were Jewish people. That prejudice prevailed against them, and that since the rendition of the original opinion in this cause, the Supreme Court of Oklahoma has defined due process of law and the question of jurisdiction, and that said opinion was rendered by the Supreme Court of Oklahoma on October 7, 1958, and is styled: *Sanitary Land Fill Company, et al.* v. *Pearson et al.*, Case No. 38198, found in the Oklahoma Bar Journal, October 11, 1958, Vol. 29, No. 34, being on page 1335, from which these petitioners hope as follows:

> "The petitioners present two propositions as grounds for vacating the award. It is first argued the State Industrial Commission was without jurisdiction to enter the order. Petitioners cite in support thereof, *Williams* v. *Central Products Co. et al.*, 205 Okla. 266, 236 P.2d 984; 85 O.S. 1951, Section 14, and *Derr* v. *Weaver et al.*, 177 Okla. 100, 57 P.2d 1153. While conceding the effect

of the rule that an order can be made only for medical expenses incident to the award made, respondents attempt to distinguish the cases relied upon by petitioners in the case under consideration. Their applicability will not be discussed here because of the disposition made under the second proposition which is that the petitioners were denied a hearing on the claims before the State Industrial Commission.

"There was no order of the State Industrial Commission setting the case for a hearing. The findings of the State Industrial Commission are such as require a determination after due consideration of the evidence that petitioners might wish to present and such argument as they might choose to make after a full and complete hearing.

"We are of the opinion and hold that due process was denied the petitioners, *Amerada Petroleum Corporation* v. *Hester et al.*, 188 Okla. 394, 109 P.2d 820; *Conrad* v. *State Industrial Commission et al.*, 181 Okla. 325, 73 P.2d 858; *Pioneer Mills Co. et al.* v. *Webster et al.*, 186 Okla. 616, 99 P.2d 507; and *Kiespert dba Kiespert Auto Salvage*, Okl., 324 P.2d 283.

"In *Conrad* v. *State Industrial Commission et al., supra*, it is stated:

" 'In considering the claim of an attorney for fees in a proceeding before it the commission should not act arbitrarily nor upon an *ex parte* hearing but only after an opportunity has been afforded all of the parties interested to be present and to present their evidence in support of and in opposition to the claim and to thereupon approve the claim in such amount as may be commensurate to the services rendered by the attorney, at all times having due regard to the rights of both the workman and the attorney * * *'

"We think by analogy the above language is applicable to the proceeding on the claims for medical expenses presented in this case.

"The cause is remanded to the State Industrial Commission, with directions to vacate the order allowing the claims and to set the case for hearing on due notice to all parties in accordance with the views herein expressed.

"Welch, C. J., and Davison, Halley, Johnson, Blackbird, Jackson, and Carlile, JJ., concur."

Petitioners think the language used by the Supreme Court of Oklahoma in this cause clearly shows that in the present case, these petitioners were denied due process of law.

These petitioners do not abandon the authority heretofore cited by calling attention to the case above mentioned by the Supreme Court of Oklahoma by virtue of the fact that petitioners believe said last named case is an intervening circumstance of substantial and controlling effect, which opinion has been written by the Supreme Court of Oklahoma since this case was originally submitted and is in accord with the ruling of this Court. See *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 34.

There is another substantial ground not previously presented and should be presented by virtue of the holding of this Court: *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50.

The other substantial ground not previously presented is, that the provisions of the wage and hour law granting attorneys fee involved in this cause against these petitioners

is unconstitutional and void. The reason that it is unconstitutional and void is simply the fact that it gives to the respondent, who was plaintiff in the trial court, the right to collect attorney's fee from the respondent if he is successful. It, therefore, denies equal protection of the law in violation of the Fifth Amendment to the Constitution of the United States of America, and the Fourteenth Amendment to the Constitution of the United States.

The Court's attention is called to the case of *Chicago, R. I. & P. Ry. Co.* v. *Mashore*, 21 Okla. 275, 96 Pac. 630, 17 Ann. Cas. 277, the Supreme Court of Oklahoma used this language:

> "Mr. Cooley, in his work on Constitutional Limitations (sixth edition, p. 483), says:
>
> " 'But every one has the right to demand that he be governed by general rules; and a special statute, which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.'
>
> "The statute providing the assessment of attorney's fees in cases of this character is violative of the fourteenth amendment of the Constitution of the United States, in that it does not give to all parties the same, equal protection of the law. The defendant, being sued for wages under this statute, is not on an equal footing

with the plaintiff. If he makes an unsuccessful defense, he is mulcted in an attorney's fee, to be paid to the plaintiff, while if he is successful, the plaintiff is not required to pay any attorney's fee to him. In other words, justice is not dispensed, with an impartial and equal hand, to these litigants. A court is always loath to hold a statute, the solemn act of the Legislature, unconstitutional and void, and never does so, except where its provisions make this duty a plain and imperative one. In the present case we have examined a large number of authorities wherein the constitutionality of such statutes has been raised, and in every one of them the court of last resort has held it unconstitutional."

to the same effect is the case of *Oligschlager* v. *Stephenson*, 24 Okla. 760, 104 Pac. 345.

Petitioners now show that the granting of the attorney's fees herein against these petitioners was an unwarranted application of judicial force. These petitioners respectfully show that they believe and sincerely insist as American citizens of this Republic that this Court should take jurisdiction over this cause and decide the question involved and presented in their Petition for Certiorari, and the additional laws herein presented.

WHEREFORE, these petitioners most respectfully believe and ask this Honorable Court to grant rehearing herein, take jurisdiction of this cause, and reverse the judgment complained of.

Respectfully submitted,

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for the Petitioners.

CERTIFICATE

I, John B. Ogden, attorney for the petitioners herein, hereby certify that the above Petition for Rehearing is not filed for delay but is filed in good faith and in order that substantial justice may be done.

JOHN B. OGDEN,
Attorney for Petitioners.

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of this Petition for Rehearing to opposing counsel, Roger Swan, Braniff Building, Oklahoma City, Oklahoma on the 28th day of October, 1958.

JOHN B. OGDEN,
Attorney for Petitioners.